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CASE NO. 83-705

UNITED STATES SUPREME COURT

October Term, 1983

WERNER DIRON,
Petitioner
V
CITY OF EASTLAKE
and
MORRIS BECKER, Individually and
as Mayor of the City of Eastlake,
Respondents

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONSE TO RESPONDENTS' QUESTIONS PRESENTED AND STATEMENT OF THE CASE

The "admitted position as head" has been taken out of context in order to enhance the argument of Respondents that laches is a substitute for a state statute of limitations in order to circumvent the Congressional intent to allow redress in the courts under Section 1983. Diron's affadavit (see Appendix) filed with his Brief in Opposition to Joint Motion of Defendants for Summary Judgment, clearly raised questions about whether he was a classified or an unclassified employee. Coupled with the commendation letter of October 6, 1978 which he received from his superior, the Director of Public Services, Diron clearly was not the Superintendent of the Eastlake Sanitation Department.

Respondents did not follow their own procedures for discharge as mandated by Eastlake's own Charter which had adopted Ohio law concerning discharge procedures. They admit that the Eastlake City Council did not formally abolish the position of Superintendent until more than 5 months after the August 3rd, 1978 memo which Mayor Becker prepared and ordered Diron to sign (p.3 of Respondents' Brief). The lame excuse that this was done "as a cost saving measure" is irrelevant and misleading. Becker simply wanted to get rid of Diron. When put in its proper context, it is readily apparent that the position Diron held was a garbage man and truck driver. It is true that he was well respected for his diligence and dedication to being a good garbage man. When there was work to do, he did it. He was looked up to as a result. He was paid accordingly.

RESPONSE TO RESPONDENTS' ARGUMENTS

I.A. There was no point in pursuing an administrative remedy; what use would it have been to have been reinstated to a job in which he was back working again for the Mayor who had fired him? And the time within which to seek a judicial remedy under any applicable Ohio Statute of limitations was at least four years and more probably ten — it is that statute of limitations that Respondents seek to deny Petitioner under an equitable

doctrine, when Respondents themselves have not done equity.

I.B. The reasoning in the *Sheets* case was for a mandamus action. It was bad law in 1944, and age has given that type of thinking no reason for being perpetuated. Of course Sheets could have refrained from applying for a pension. When you are fired and no longer employable, of course you are going to seek income from your pension if you have one. *State, ex rel. Sheets v Portsmouth*, 143 Oh St 302.

Diron was not the Superintendent — although Becker's document stated he was. Diron's own boss said he was a working foreman — hardly an unclassified job. He didn't voluntarily retire — there was coercion and attempted cover-up. And the job wasn't abolished until months after Diron was wrongfully and in bad faith fired.

I.C. Since *Arant*-type thinking in 1918 considered "manifest inequity," is it not time to accept as "manifest inequity" what a comparison of the Mayor's August 3, 1978 memo with the Service Director's October 6, 1978 commendation clearly shows? If there had been no bad faith discharge of Diron by the all-powerful governmental authority, this question of equity under Section 1983 would not even be being raised here.

II.A. Diron was a garbage man, and therefore a classified employee. His affidavit (see Appendix) left no question of that. The attempt by Becker to promote Diron to "Superintendent" so as to legally fire him can easily be seen through. Respondents have sought to promote him into an unclassified status in order to evade answering for their wrongful discharge of him.

The "royal gift" as cited in *Knoup* bestowed upon Diron was the right to collect garbage. *Knoup, Treasurer v Piqua Branch of State Bank of Ohio*, 1 Oh St 603 (1853). And the Mayor took it away.

The highest court in Ohio to rule on the question has held that public employement is a property right for which a damage suit may be brought under 42 USC 1983. *Jackson v. Kurtz* [*citing Board of Regents v Roth*, 408 US 564 (1972)], 69 Oh Ap 2d 152(1979).

The transparent attempt to elevate Diron to "Superintendent" is simply an excuse by the Mayor of the City of Eastlake to avoid and evade compliance with the

procedural rights to which Diron was entitled under Eastlake's own Charter: written charges; reasons; the filing of an order; an opportunity to be heard (Ohio Revised Code Section 124.34). How can Respondents ask that the equitable doctrine of laches be invoked, when they themselves did not do equity! All this is merely an effort to have an equitable doctrine time bar a clear statutory right to relief under an Ohio statute of limitations that governs where no Congressional time limit has been clearly stated.

Earlier this year, the 3rd Circuit was faced with the question whether to apply a 6-month or a 6-year statute of limitations to an action involving Section 1983. In deciding that the longer limitations period applied, the Court followed the reasoning that because Congress has not prescribed a specific statute of limitations for actions brought under Section 1983, it is necessary to borrow the state law of limitations governing an analogous cause of action; it then analogized that claim under the federal Civil Rights Acts to those torts which involved the wrongful interference with another's economic rights or interests. It stated that the borrowed state statute reflects Congress' view that the borrowed statute serves only as the source of the federal law which appropriately governs federal civil rights actions. When poured into the federal vessel, the Court went on, the state statute becomes a federal legal precept, and all aspects of the proceeding must be measured by the federal interest implicated in the case. The void created by Congress' failure to establish a statute of limitations for Section 1983 actions, the Court determined, cannot be filled with a state limitations provision which is inconsistent with the federal interest sought to be vindicated. The Court stated that to apply the shorter limitations time would "contravene the remedial purpose of federal civil rights actions and deny appellant the breadth of Section 1983's sweep," and would tend to severally limit access to the courts for the purpose of vindicating individual rights. *Knoll v Springfield Township School District*, 699 F 2d 137 (3rd Cir. 1983). This Court should make clear that a Section 1983 action brought well within the Ohio statute of limitations cannot be time barred through erroneous application of an equitable doctrine, particularly where no equity has

been done by the political agency seeking to exercise its whim.

II.B. Diron was not on the witness stand—neither his demeanor nor the context of his statement excerpted by Respondents was observed by any trier of fact. His affidavit was a proper way to oppose the Summary Judgment Motions. By itself it raised a question that was not answered as a matter of law as to whether he was or was not a classified employee.

CONCLUSION

Ohio's governing statute of limitations clearly gives Diron ten years within which to file. The intent of Congress under Section 1983 is to grant relief, not stifle it. It is not true that the position formerly held by Diron has been abolished for almost five years — he never was Superintendent. It is time to consider the rights of the victim of this bad faith discharge by the elected agency acting under color of the authority of City of Eastlake.

Diron had a property interest, a claim of entitlement, in his job as garbage man, and the Mayor deprived him of it without due process.

That Diron could have proceeded under Ohio administrative law has no bearing upon his right to be heard in a Section 1983 action. He could have proceeded under both. He was not required to elect which remedy to pursue. The remedies are not mutually exclusive. Yet the trial court and the 6th Circuit have now held that they are. That in itself flies in the face of the Congressional intent of Section 1983, and requires intervention by this Court to correct that error.

Neither the District Court nor the 6th Circuit was authorized, in deciding a Summary Judgment, to decide disputed issues of fact. Yet both did. They did so even though each Court had before it Diron's affidavit, and the memoranda of August 1, 1978 and August 3rd, 1978, as well as the October 6th, 1978 letter of commendation from Eastlake's Director of Public Services, who described his former employee as a "working foreman," not a "Superintendant." Each Court also had before it Eastlake's procedure for terminating working foremen (classified

employees), which its Mayor didn't follow.

Cases involving black lung disease, inhalation of asbestos, and wrongful internment of Japanese-Americans during World War II, all of which occurred decades ago, are now being listened to in our courts. Diron's suit was filed within two years of his wrongful discharge, well within Ohio's ten-year statute of limitations. Shouldn't those public employees who have been subjected to oppression by the whims of elected politicians have the right to be heard under 42 USC Section 1983?

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APPENDIX

STATE OF OHIO :
: SS AFFIDAVIT
COUNTY OF LAKE :

WERNER DIRON, being first duly sworn according to law, deposes and says that he is the plaintiff in this case, and that he had been hired in 1966 by then Mayor Robert Brown to work in the City of Eastlake Sanitation Department; he worked for over twelve years, ending as a foreman on September 22, 1978, his sixty-fifth birthday. His duties at the time of his termination included driving the garbage truck and collecting garbage and rubbish in and about the City of Eastlake. Up through September 22, 1978, he was physically able to perform his duties, and

still is. On or about August 1, 1978, shortly after he returned from his scheduled vacation, plaintiff was told by defendant Morris Becker that plaintiff should either retire or that he would be laid off. No warning had been given to him, nor was any reason given to plaintiff. Faced with having to make an immediate decision about his whole future at the age of 64, and believing under these circumstances that his chances for future income were greater if he were laid off, plaintiff dictated and signed an Inter Office Memo shortly after his first meeting with defendant Becker, stating he would prefer to be laid off. The following day plaintiff was called by David Miller, Eastlake's Finance Director, and told that plaintiff could come back to work on condition that plaintiff give Mayor Becker assurance that plaintiff would retire on plaintiff's sixty-fifth birthday, September 22, 1978. Plaintiff reported for work the next day, but before being permitted to work, he was required to see defendant Becker. At a very short meeting, plaintiff was told by defendant Becker, "You quit or be fired!" Immediately thereafter defendant Becker handed plaintiff a pen and ordered him to sign a document which stated that plaintiff wished to voluntarily resign from the City of Eastlake because plaintiff's position as Superintendent of Sanitation had been abolished. Under those circumstances, plaintiff signed. Plaintiff was not Superintendent of Sanitation. The position of Superintendent of Sanitation had not been abolished as of either August 1, 1978, August 3, 1978, or September 22, 1978. Plaintiff's position as foreman had not been abolished at the time that document was presented by defendant Becker to plaintiff to sign, or at any other time. Plaintiff was led to understand that if he were laid off, as opposed to resigning, he would receive none of his accumulated sick leave. Plaintiff was paid only a portion of the sick leave that he had accumulated. Plaintiff did not want to leave the employ of Eastlake. No complaints, charges or accusations were made against plaintiff as a reason for requiring plaintiff to leave his employment, either written or oral. Defendants did not hold any hearing at which plaintiff was allowed to defend himself. After plaintiff's meeting with defendant Becker on or about August 3, 1978, plaintiff was permitted to work until his sixty-fifth birthday, September 22, 1978. Mayor Becker did not hire

or appoint plaintiff, nor did he promote plaintiff; in fact, Mayor Becker fired plaintiff.

Affiant further says that he did not make policy decisions, nor was he consulted on policy decisions. Mayor Becker never consulted with affiant in policy matters.

Since he was given no choice by Mayor Becker except to quit or be fired, and believing that no one else would hire him at his age and with his job background, affiant felt he had to make some decisions quickly in order to provide the most income he could for himself and his wife.

Affiant further states that he never wanted to retire, and that he did so only because he was forced to. He wanted to keep working at his job for the City of Eastlake, and believes he still would be doing that job if he had not been forced to retire.

/s/ Werner Diron
Werner Diron

SWORN TO BEFORE ME and subscribed in my presence this *16* day of March 1982.

/s/ Albert B. Polen
Albert B. Polen, Notary Public
for the State of Ohio
My commission has no
expiration date
R.C. 147.03

CERTIFICATE OF SERVICE

Three copies each of the foregoing Reply Brief were sent to Theodore R. Klammer, Attorney for City of Eastlake, Respondent, c/o Mastrangelo, Freda & Klammer, Parkhill Professional Building, 35100 Euclid Avenue, Willoughby, Ohio 44094 and to C. Reynolds Keller, Jr., Attorney for Morris Becker, Respondent, c/o Weston, Hurd, Fallon, Paisley & Howley, 2500 Terminal Tower, Cleveland, Ohio 44113 by regular U.S. mail, postage prepaid, this _____ day of December, 1983.

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